

BB

BEFORE THE DEPARTMENT OF  
NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION	)	
FOR BENEFICIAL WATER USE PERMIT	)	NOTICE OF ERRATA
NO. 49636-s41H BY CHRISTOPHER W.	)	
AND BARBARA C. PARKENING	)	

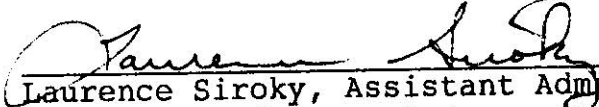
\* \* \* \* \*

The Amended Final Order dated September 29, 1989, contains two typographical errors as follows:

Page 1, third line under AMENDED ORDER,  
Permit No. 49535-s41H should read 49636;

Page 2, third line, "December 21," should  
read "December 31."

Dated this 12 day of October, 1989.

  
\_\_\_\_\_  
Laurence Siroky, Assistant Administrator  
Department of Natural Resources  
and Conservation  
1520 East 6th Avenue  
Helena, Montana 59620

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Notice of Errata was duly served upon all parties of record at their address or addresses this 13<sup>th</sup> day of October, 1989, as follows:

Christopher and Barbara Parkening  
1002 Riverside #32  
Burbank, CA 91506


John C. Paugh, Jr.  
378 Hulbert East Road  
Bozeman, MT 59715

J. David Penwell  
Attorney at Law  
P.O. Box 1677  
Bozeman, MT 59715-1677

Scott Compton  
Field Manager  
111 North Tracy  
Bozeman, MT 59715

**CASE # 49636**

James Madden, Legal Counsel  
Department of Natural Resources  
and Conservation  
1520 East 6th Avenue  
Helena, MT 59620

  
Irene V. LaBare  
Legal Secretary

**CASE # 49636**

BEB

BEFORE THE DEPARTMENT OF  
NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION	)	
FOR BENEFICIAL WATER USE PERMIT	)	
NO. 49636-s41H BY CHRISTOPHER W.	)	AMENDED
AND BARBARA C. PARKENING	)	FINAL ORDER

\* \* \* \* \*

By Order of December 16, 1988 the Department granted the above Application, subject to specific measurement conditions. Subsequently, the Applicant and the Objector agreed in writing to modify the measurement conditions. Because those conditions were primarily for the benefit of the Objector, the Department hereby modifies the conditions to reflect the stipulation of the parties.

WHEREFORE, the Department makes the following:

AMENDED ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Application for Beneficial Water use Permit No. 49535-s41H is hereby granted to Christopher W. and Barbara C. Parkening to divert 1500 gpm up to 2419 acre-feet of water per year for nonconsumptive use for fish and wildlife purposes.

The water will be diverted from Dry Creek, a tributary of the East Gallatin River, by means of a culvert located at a point in the NW $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 12, Township 2 South, Range 4 East, Gallatin County, Montana. The water will flow by means of ditches through two ponds located in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$  and the

**CASE # 49636**

SW¼SE¼NW¼ of Section 12, Township 2 South, Range 4 East, Gallatin County, Montana.

The period of use shall be January 1 through December 21, inclusive, of each year. The priority date for this Permit is December 6, 1982 at 8:15 a.m.

The Permit in this matter is issued subject to the following express terms, conditions, restrictions, and limitations:

A. This Permit is subject to all prior and existing water rights, and to any final determination of such rights as provided by Montana Law. Nothing herein shall be construed to authorize appropriations by the Permittees to the detriment of any senior appropriator.

B. Issuance of this Permit by the Department shall not reduce the Permittee's liability for damages caused by exercise of this Permit, nor does the Department, in issuing this Permit, acknowledge any liability for damages caused by exercise of this Permit, even if such damage is a necessary and unavoidable consequence of the same.

C. The Permittees shall allow the waters to remain in the source of supply at all times when the water is not reasonably required for the Permittees' Permit uses. No more than 1500 gpm may be diverted by the Permittees, and the diversion system must be adjusted or modified to limit the diverted flow rate to this amount.

D. The Permittees must install accurate measuring devices at the point of diversion and at the point where water leaves



their diversion system and returns to the creek. When the measuring devices have been installed, the Permittees shall notify the Bozeman Water Rights Bureau Field Office, which will review the installation to ensure that the measuring devices are adequate in design and location to measure any water losses which may occur in the Applicants' diversion system.

E. The Permittee will have an impartial party take flow measurements at both measuring stations once a month during the months of November, December, January, February, and March. The measurement will be taken for two years to determine if there is any consumptive use of the ponds during these months.

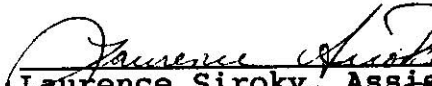
F. The Permittee will replace any water that is determined to be consumptively used during the months of November, December, January, February, and March by means of an existing well or new well if deemed necessary. The replacement of the water can occur by replacing the actual consumed water directly into Dry Creek, or Permittee may close the diversion point. The Objector has no objection to Permittee using the existing wells or potential new well for irrigation.

G. In consideration of the Permittee installing the measuring devices and the Permittee replacing any water consumed by the Ponds, the Objector by stipulation has withdrawn his objection. The Permittee's failure to install the measuring devices, to take measurements, or to replace water consumed, may result in modification or revocation of this Permit, pursuant to § 85-2-314, MCA.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of the Final Order.

DATED this 29 day of September, 1989.

  
Laurence Siroky, Assistant Administrator  
Department of Natural Resources  
and Conservation  
1520 East 6th Avenue  
Helena, Montana 59620

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Amended Final Order was duly served upon all parties of record at their address or addresses this 29<sup>th</sup> day of September, 1989, as follows:

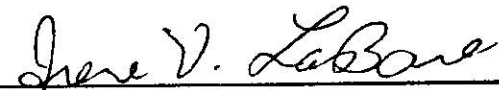
Christopher and Barbara Parkening  
83 Arrowhead Trail  
Bozeman, MT 59715

J. David Penwell  
Attorney at Law  
P.O. Box 1677  
Bozeman, MT 59715-1677

John C. Paugh, Jr.  
378 Hulbert East Road  
Bozeman, MT 59715

Scott Compton  
Bozeman Field Manager  
111 North Tracy  
Bozeman, MT 59715

James Madden, Legal Counsel  
Department of Natural Resources and Conservation  
1520 East 6th Avenue  
Helena, MT 59620

  
Irene V. LaBare  
Legal Secretary

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BEFORE THE DEPARTMENT OF  
NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION	)	
FOR BENEFICIAL WATER USE PERMIT	)	FINAL ORDER
NO. 49636-s41H BY CHRISTOPHER W.	)	
AND BARBARA C. PARKENING	)	

\* \* \* \* \*

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. No timely written exceptions were received. Therefore, having given the matter full consideration, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the November 15, 1988 Proposal for Decision, and incorporates them herein by reference.

WHEREFORE, based upon the record herein, the Department makes the following:

ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Application for Beneficial Water Use Permit No. 49636-s41H is hereby granted to Christopher W. and Barbara C. Parkening to divert 1500 gpm up to 2419 acre-feet of water per year for nonconsumptive use for fish and wildlife purposes.

The water will be diverted from Dry Creek, a tributary of the East Gallatin River, by means of a culvert located at a point in the NW $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 12, Township 2 South, Range 4 East,

**CASE # 49636**

Gallatin County, Montana. The water will flow by means of ditches through two ponds located in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$  and the SW $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 12, Township 2 South, Range 4 East, and will be returned to Dry Creek at a point in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 12, Township 2 South, Range 4 East, Gallatin County, Montana.

The period of use shall be January 1 through December 31, inclusive, of each year. The priority date for this Permit is December 6, 1982 at 8:15 a.m.

The Permit in this matter is issued subject to the following express terms, conditions, restrictions, and limitations:

A. This Permit is subject to all prior and existing water rights, and to any final determination of such rights as provided by Montana Law. Nothing herein shall be construed to authorize appropriations by the Permittees to the detriment of any senior appropriator.

B. Issuance of this Permit by the Department shall not reduce the Permittee's liability for damages caused by exercise of this Permit, nor does the Department, in issuing this Permit, acknowledge any liability for damages caused by exercise of this Permit, even if such damage is a necessary and unavoidable consequence of the same.

C. The Permittees shall allow the waters to remain in the source of supply at all times when the water is not reasonably required for the Permittees' Permit uses. No more than 1500 gpm may be diverted by the Permittees, and the diversion system must

be adjusted or modified to limit the diverted flow rate to this amount.

D. The Permittees must install accurate measuring devices at the point of diversion and at the point where water leaves their diversion system and returns to the creek. When the measuring devices have been installed, the Permittees shall notify the Bozeman Water Rights Bureau Field Office, which will review the installation to ensure that the measuring devices are adequate in design and location to measure any water losses which may occur in the Applicants' diversion system.

E. Flow measurements must be taken at both measuring stations at least once every two weeks, and a written record of these measurements must be kept. Copies of these records shall be submitted to the Bozeman Field Office by November 30 of each year, and also shall be available to the Department upon request.

Failure to install the required measuring devices, or to take measurements and keep written records of the measurements taken, may result in modification or revocation of this Permit. See § 85-2-314, MCA.

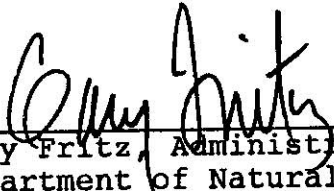
F. If the Department, based on a review of the water measurement records and other available information, determines that the Permittees' diversion system is consumptive (e.g., more than a de minimus amount of water is being lost between the point of diversion and the point of return), the Permittees will be required to line the ponds and ditches and/or take whatever other steps are necessary to return their diversion system to noncon-

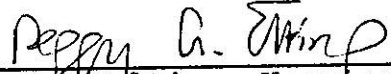
sumptive status, or to apply for authorization for a consumptive use. If the Permittees do not either make the necessary alternatives or obtain authorization for consumptive use, they will be required to show cause why the Permit in this matter should not be revoked.

#### NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of the Final Order.

Dated this 16 day of December, 1988.

  
\_\_\_\_\_  
Gary Fritz, Administrator  
Department of Natural  
Resources and Conservation  
Water Resources Division  
1520 East 6th Avenue  
Helena, Montana 59620-2301  
(406) 444-6605

  
\_\_\_\_\_  
Peggy A. Elting, Hearing Examiner  
Department of Natural Resources  
and Conservation  
1520 East 6th Avenue  
Helena, Montana 59620-2301  
(406) 444-6612

#### CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record at their address or addresses this 19th day of December, 1988, as follows:

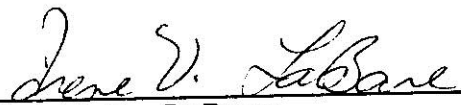
Christopher and Barbara Parkening  
83 Arrowhead Trail  
Bozeman, Montana 59715

J. David Penwell  
P.O. Box 1677  
Bozeman, Montana 59715-1677

CASE # 49636

John C. Paugh, Jr.  
378 Hulbert East Road  
Bozeman, Montana 59715

Scott Compton  
Bozeman Field Manager  
1201 East Main  
Bozeman, Montana 59715

  
\_\_\_\_\_  
Irene V. LaBare  
Legal Secretary

F.Y.I. -

- The proposed conditions (pp. 15-16) may be useful for situations <sup>BB</sup> where it is important that the use be relatively nonconsumptive and/or where it is important that the Permittee install measuring devices and keep records. The Bozeman office recommends that we use the second part of Condition E more often. See also Conclusion of Law 8 (pp. 12-13).

BEFORE THE DEPARTMENT  
OF NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION )  
FOR BENEFICIAL WATER USE PERMIT ) PROPOSAL FOR DECISION  
NO. 49636-s41H BY CHRISTOPHER W. )  
AND BARBARA C. PARKENING )

\* \* \* \* \*

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matter on April 25, 1988 in Bozeman, Montana.

Applicants Christopher and Barbara Parkening appeared at the hearing by and through counsel J. David Penwell.

Steven Thorson appeared as a witness for the Applicants.

Objector John C. Paugh, Jr. did not appear at the hearing, but submitted a sworn statement for the record in this matter. (See Preliminary Matters.)

Jan Mack, New Appropriations Supervisor with the Bozeman Water Rights Bureau Field Office, appeared at the hearing as staff expert witness for the Department of Natural Resources and Conservation (hereafter, the "Department").

PRELIMINARY MATTERS

Objector John C. Paugh, Jr. did not attend the hearing in this matter. However, he was granted the opportunity to review the Department file and the oral record of Applicants' case and to make written response, subject to cross-examination.

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On May 27, 1988, the Department received a sworn statement from the Objector, stating his concerns with the proposed project. The record in this matter then was left open for a period of time in order to allow for a question-and-answer exchange, and for a response by the Applicants to the issues raised by the Objector. On August 15, 1988, the Department received the Applicants' response, and the record was closed.

The Hearing Examiner hereby notes for the record that certain arguments included in the Applicants' response have not been accorded any weight, since they are based on misstatements of fact.

Specifically, the Applicants' argument that the ponds were sealed when they were constructed (Response, page 3) is directly contradicted by the testimony of the Applicants' own witness, Steven Thorson, that the ponds have sealed themselves over the years by the settling and packing of sediment into the gravel. Additionally, and of more concern, is the Applicants' argument that the Objector "has acknowledged that his remedy" (for winter water shortages) is "simply to drill a well and have a self-watering system installed with a water heater" (Response, page 5). The Objector's answers clearly indicate that, while such a water supply might possibly be more reliable (but the Objector is not certain that it would), the Objector is asserting his right to exercise his senior water right from Dry Creek. (See Applicants' questions 26 and 27, and Objector's answers thereto.)

The Objector did not even arguably acknowledge that his concerns can be remedied by developing a groundwater source of stockwater.

Therefore, for the reasons stated, the specified arguments by the Applicants have not been accorded any weight in this matter.

#### EXHIBITS

The Applicants did not offer any exhibits for inclusion in the record in this matter.

The Objector did not offer any exhibits for inclusion in the record in this matter.

The Department offered one exhibit for inclusion in the record in this matter.

Department Exhibit 1 is a memorandum by Jan Mack, dated April 11, 1988. The memo describes a site visit Mr. Mack made to the Applicants' project on April 11, and measurements taken by him.

Department Exhibit 1 was accepted for the record without objection.

The Department file was made available for review by all parties. No party offered objection to any part of the file. Therefore, the Department file is included in the record in its entirety.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following proposed Findings of Fact, Conclusions of Law, and Order.

### FINDINGS OF FACT

1. MCA §85-2-302 states, in relevant part, "Except as otherwise provided in (1) through (3) of 85-2-306, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or distribution works therefor except by applying for and receiving a permit from the department." The exceptions to permit requirements listed in MCA §85-2-306 do not apply in this matter.

2. Application for Beneficial Water Use Permit No. 49636-s41H was duly filed with the Department of Natural Resources and Conservation on December 6, 1982 at 8:15 a.m.

3. The pertinent portions of the Application were published in the Bozeman Daily Chronicle, a newspaper of general circulation in the area of the source, on January 12, 19, and 26, 1983.

4. The source of water for the proposed appropriation is Dry Creek, a tributary of the East Gallatin River.

5. The Applicants have applied for 1500 gallons per minute ("gpm") up to 2419 acre-feet of water per year for fish and wildlife use in two ponds in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$  and the SW $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 12, Township 2 South, Range 4 East, Gallatin County, Montana. Water is diverted into the two ponds from Dry Creek, a tributary of the East Gallatin River, at a point in the NW $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 12, and is returned to Dry Creek at a point in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 12, Township 2 South, Range 4 East, Gallatin

County, Montana. The requested period of appropriation is January 1 through December 31, inclusive, of each year.

6. Water is to be diverted from Dry Creek to the ponds by means of an 18 inch culvert, which leads under a road and into a ditch. The ditch carries water into one pond, which empties into a ditch leading into the second pond. A short ditch then carries the water from the second pond through a concrete "wing" structure, where it empties back into Dry Creek. (See photographs and maps accompanying June 14, 1983 Field Report by Jan Mack.)

The ponds have been in existence since approximately 1976, although the present point of diversion has been moved slightly (in the same quarter/quarter/quarter section) since the Application was filed in 1982. (See Department file.)

7. The two ponds are used for fish and wildlife purposes. Steven Thorson, caretaker of the Applicants' property for several years, testified that the ponds are used as waterfowl habitat by ducks and geese, both a year-round population and migratory populations. Testimony by Department witness Jan Mack confirms the presence of waterfowl at the place of use.

Mr. Thorson also testified that there is a fish population in the ponds, although he was not sure whether the fish are native or have been introduced into the ponds by the Applicants through stocking.

8. The Applicants have applied for a nonconsumptive use of water. (See Public Notice.)

Steven Thorson testified that the ponds probably did leak water into the underlying gravel strata when they first were constructed, but that he believes the ponds have become lined with sediment that settles out of the water as it goes through the ponds, and that the ponds have "sealed". Mr. Thorson stated that he sees the flow through the ponds on a daily basis, and cannot determine a difference between the flow entering the ponds and the flow that returns to the creek. Jan Mack also testified that there was no noticeable difference, but that he had been unable to take actual measurements which would provide more reliable information.

When questioned about evaporative losses, Mr. Mack stated that there was likely to be more evaporation from the ponds than would occur if the water was left in the creek, due to an increased surface area. He stated that Larry Brown (Water Sciences Department, Montana State University) gave an estimate that one acre of surface area would evaporate 2.5 acre-feet of water per year. This would result in slightly more than 1 acre-foot of evaporation occurring from the approximately .5 acre-foot surface area of the ponds.

9. The concern expressed by Objector John C. Paugh, Jr. is that water percolates out of the ponds and into the substructure during the winter, "thus lowering the supply of water in the creek and increasing the likelihood of the stream freezing and gorging downstream", which would shut off his year-round stock-

water use.<sup>1</sup> (May 27, 1988 affidavit by John Paugh.) Mr. Paugh stated that (to his knowledge) the source creek gorged one time before, and "several times" after, the ponds were put in (written response to Applicants' question 16), but that most of the time the stream continued to flow past the ponds during the winter as well as during the summer. (Response to Applicant's question 17.)

Mr. Paugh stated that the "common occurrence in this region of the valley in this particular aquifer" is for the subsurface water level to drop in the fall and winter months, increasing the opportunity for percolation from the ponds. (May 27, 1988 affidavit.) In support of this, he referred to a geological survey paper which found that the water level in a well within a half-mile of the Applicant's ponds rises in the spring and summer and drops in the fall and winter. (See response to Applicants' question 9.)

Mr. Paugh also referred to Mr. Thorson's testimony at the hearing that the water depth in the larger pond dropped to approximately five feet at one point when water froze above the ponds as evidence that water had percolated out of the pond into the "sub-water level". (Affidavit.) However, Mr. Thorson's testimony indicates that there is "an adequate drop" along the watercourse on the Applicants' property to keep water moving,

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<sup>1</sup>The parties in this matter used the term "gorging" to refer to the stream condition which occurs when a creek freezes from the bottom, with water running over the ice and freezing in its turn, until the creek is outside its channel. Testimony of Jan Mack.

with the ditch going out of the ponds at a lower level than the incoming ditches, with a "bowl" area which doesn't drain. Mr. Thorson's testimony indicates that the pond drained due to the elevation difference rather than to percolation, since approximately five feet of water remained in the pond while the supply was shut off.

10. The Applicants have applied for a flow rate of 1500 gpm (up to 2419 acre-feet per year, a volume which is based on continuous flow at 1500 gpm). Steven Thorson testified that this flow rate is half, or a little less, of the flow in Dry Creek during the winter months (the period of lowest flow). He testified that this flow is sufficient to keep the ponds at full level throughout the year.

On April 11, 1988, Jan Mack observed the flow of water through the Applicants' project, and estimated the flow rate to be 1615 gpm. (See April 11, 1988 memorandum by Jan Mack.) Mr. Mack concluded that the present diversion system is capable of diverting the requested flow rate of 1500 gpm. (Testimony; April 11, 1988 memorandum.)

11. A review of Department records does not disclose other planned uses or developments on Dry Creek for which a permit has been issued or for which water has been reserved.

Based upon the foregoing Findings of Fact and upon the record in this matter, the Hearing Examiner makes the following:

PROPOSED CONCLUSIONS OF LAW

1. The Department gave proper notice of the hearing, and all relevant substantive and procedural requirements of law or rule have been fulfilled, therefore the matter was properly before the Hearing Examiner.

2. The Department has jurisdiction over the subject matter herein, and all the parties hereto. See Finding of Fact 1.

3. The Department must issue a Beneficial Water Use Permit if the Applicant proves by substantial credible evidence that the following criteria are met:

- (1) (a) there are unappropriated waters in the source of supply:
  - (i) at times when the water can be put to the use proposed by the applicant;
  - (ii) in the amount the applicant seeks to appropriate; and
  - (iii) throughout the period during which the applicant seeks to appropriate the amount requested is available;
- (b) the water rights of a prior appropriator will not be adversely affected;
- (c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;
- (d) the proposed use of water is a beneficial use;
- (e) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved.

4. The proposed use of water, for fish and wildlife, is a beneficial use of water. See MCA §85-2-102(2).

5. The proposed use of water will not interfere unreasonably with other planned uses or developments for which a permit has been granted or for which water has been reserved. See Finding of Fact 11.



6. There are unappropriated waters in the source of supply at times when the water can be put to the use proposed by the Applicant, in the amount the Applicant seeks to appropriate, and the amount requested is available throughout the period during which the Applicant seeks to appropriate.

"Unappropriated waters" are those waters which have not been diverted, impounded, withdrawn, or reserved for future use by a public agency. See generally MCA §85-2-102(1). Whether unappropriated waters are available in the source of supply can be determined on the basis of (a) whether there is water physically available at the Applicants' proposed point of diversion throughout the period of diversion, in at least some years (water is not unavailable due to its being diverted, impounded, or withdrawn by upstream water users), and (b) whether the water which is physically available to the Applicants is legally available (not needed downstream to fulfill senior water uses), and the Applicants therefore can utilize the requested amount of water throughout the period of appropriation in some years without being called by a senior user. See In the Matter of Application for Beneficial Water Use Permit No. 60662-s76G by Wayne and Kathleen Hadley (March 21, 1988 Proposal for Decision).

The record in this matter indicates that water is physically available in the amount the Applicants are requesting, throughout the Applicants' proposed period of diversion. See Finding of Fact 10. Since the water diverted by the Applicants is not consumed, but is returned to the source creek for use by down-

stream users (Findings of Fact 6, 8), the water which is physically available to the Applicants also is legally available.<sup>2</sup>

7. There is substantial credible evidence that the Applicants' project is substantially nonconsumptive and, as such, will not adversely affect the water rights of a prior appropriator.

The Objector in this matter alleges that water is percolating out of the Applicants' ponds, at least during the winter-time. (See Finding of Fact 9; May 27, 1988 affidavit.) However, apart from general arguments concerning the behavior of subsurface water in the area, the Objector has not provided any information which indicates that such percolation is in fact occurring.

Testimony by the Applicants' witness indicates that the ponds are sealed at the present time, and testimony by this witness and by the Department witness indicates that the flows going out of the Applicants' diversion system closely approximate the flows entering the system. (See Finding of Fact 8.) Since the flows were estimated, rather than accurately measured, it is

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<sup>2</sup>Apparently, Objector Paugh does not get his stockwater during the winter on the few occasions when the creek gorges. (Finding of Fact 9.) However, it is unlikely that Mr. Paugh would "call the stream" under these circumstances, since any flow which the Applicants would release or bypass in response to a call could not make it down the creek if the stream has gorged below the Applicants. (Mr. Paugh has no knowledge of the creek gorging above the Applicants' point of diversion. See Response to Applicants' question 19.) In any case, the creek usually continues to flow year-round (see Finding of Fact 9), so that the Applicants clearly can divert the requested amount of water throughout their period of diversion in most years, if not all, without being called by a senior user.

possible that there is a small loss, which may be due in part or in whole to evaporation.<sup>3</sup> However, there is nothing in the record to indicate that a loss small enough that it is not noticeable by observation could adversely affect appropriators such as the Objector.

8. Conditions must be placed on any permit granted in this matter to ensure that the Applicants' proposed use remains nonconsumptive.

There is substantial credible evidence that the project in its present condition is nonconsumptive, for all intents and purposes. (Conclusion of Law 7, above.) However, since the ponds and ditches are not lined, this situation could change: a flood or other hydrologic or geologic event could disturb the sediment presently sealing the bottom of the ponds, for example, and/or over time the ditches could erode down into the gravel strata which the parties agree underlies the area.

The project in this matter was applied on the basis that it is nonconsumptive, and was public noticed as such. This information undoubtedly influenced the decisions of other water users as to whether or not to object to the permit. The Hearing Examiner takes notice of the fact that the Montana Power Company has filed objections to virtually all proposed consumptive uses on tributaries of, and tributaries to tributaries of, the Missouri River on

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<sup>3</sup>Evaporative loss of approximately one acre-foot a year (Finding of Fact 8) is de minimus, considering that - if the Applicants' diversion of 1600 gpm takes half or less of the flow in the creek (Finding of Fact 10) - roughly 4800 acre-feet of water flows through the Dry Creek system every year.

the basis that any diminution in water quantity will adversely affect their power generating capabilities. (The Applicants' own application for consumptive use for irrigation received an MPC objection. See Application for Beneficial Water Use Permit No. 53026-s41H.) Furthermore, the Applicants' offers of proof, and the resulting decisions made that the statutory criteria are met, are based on the nonconsumptive nature of the project.

Any alteration of the Applicants' present diversion system which would result in water consumption would create a diversion situation which differs from that which has been noticed, reviewed, and found to meet the statutory criteria. Therefore, to ensure that the statutory criteria continue to be met, and for due process considerations, any permit issued will be conditioned to require that measurement devices are installed and regular water measurements are taken. At any time that these measurements indicate that more than a de minimus water loss is occurring, the Applicants will be given the choice of lining their ponds and ditches or taking whatever other steps are necessary to maintain the diversion system as a nonconsumptive use, or applying for a consumptive use of water.

9. The flow estimates made in this matter indicate that the Applicants are diverting a larger flow rate through their system than they have applied for. (Finding of Fact 10.) The Department, however, may not issue a permit for more water than the Applicants have requested. See MCA §85-2-312(1). Therefore, the Applicants must take whatever measures are necessary to

ensure that no more than 1500 gpm is diverted through their system from Dry Creek.

WHEREFORE, based upon the foregoing proposed Findings of Fact and Conclusions of Law, and upon the record in this matter, the Hearing Examiner makes the following:

PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Application for Beneficial Water Use Permit No. 49636-s41H is hereby granted to Christopher W. and Barbara C. Parkening to divert 1500 gpm up to 2419 acre-feet of water per year for nonconsumptive use for fish and wildlife purposes.

The water will be diverted from Dry Creek, a tributary of the East Gallatin River, by means of a culvert located at a point in the NW $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 12, Township 2 South, Range 4 East, Gallatin County, Montana. The water will flow by means of ditches through two ponds located in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$  and the SW $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 12, Township 2 South, Range 4 East, and will be returned to Dry Creek at a point in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 12, Township 2 South, Range 4 East, Gallatin County, Montana.

The period of use shall be January 1 through December 31, inclusive, of each year. The priority date for this Permit is December 6, 1982 at 8:15 a.m.

The Permit in this matter is issued subject to the following express terms, conditions, restrictions, and limitations:

A. This Permit is subject to all prior and existing water rights, and to any final determination of such rights as provided by Montana Law. Nothing herein shall be construed to authorize appropriations by the Permittees to the detriment of any senior appropriator.

B. Issuance of this Permit by the Department shall not reduce the Permittee's liability for damages caused by exercise of this Permit, nor does the Department, in issuing this Permit, acknowledge any liability for damages caused by exercise of this Permit, even if such damage is a necessary and unavoidable consequence of the same.

C. The Permittees shall allow the waters to remain in the source of supply at all times when the water is not reasonably required for the Permittees' Permit uses. No more than 1500 gpm may be diverted by the Permittees, and the diversion system must be adjusted or modified to limit the diverted flow rate to this amount.

D. The Permittees must install accurate measuring devices at the point of diversion and at the point where water leaves their diversion system and returns to the creek. When the measuring devices have been installed, the Permittees shall notify the Bozeman Water Rights Bureau Field Office, which will review the installation to ensure that the measuring devices are adequate in design and location to measure any water losses which may occur in the Applicants' diversion system.

E. Flow measurements must be taken at both measuring stations at least once every two weeks, and a written record of these measurements must be kept. Copies of these records shall be submitted to the Bozeman Field Office by November 30 of each year, and also shall be available to the Department upon request.

Failure to install the required measuring devices, or to take measurements and keep written records of the measurements taken, may result in modification or revocation of this Permit. See MCA §85-2-314 (1987).

F. If the Department, based on a review of the water measurement records and other available information, determines that the Permittees' diversion system is consumptive (e.g., more than a de minimus amount of water is being lost between the point of diversion and the point of return), the Permittees will be required to line the ponds and ditches and/or take whatever other steps are necessary to return their diversion system to nonconsumptive status, or to apply for authorization for a consumptive use. If the Permittees do not either make the necessary alternatives or obtain authorization for consumptive use, they will be required to show cause why the Permit in this matter should not be revoked.

#### NOTICE

This proposal is a recommendation, not a final decision. All parties are urged to review carefully the terms of the proposed order, including the legal land descriptions. Any party



adversely affected by the Proposal for Decision may file exceptions thereto with the Hearing Examiner (1520 E. 6th Ave., Helena, MT 59620-2301); the exceptions must be filed within 20 days after the proposal is served upon the party. MCA §2-4-623.

Exceptions must specifically set forth the precise portions of the proposed decision to which exception is taken, the reason for the exception, and authorities upon which the exception relies. No final decision shall be made until after the expiration of the time period for filing exceptions, and the due consideration of any exceptions which have been timely filed.

Any adversely affected party has the right to present briefs and oral arguments pertaining to its exceptions before the Water Resources Division Administrator. A request for oral argument must be made in writing and be filed with the Hearing Examiner within 20 days after service of the proposal upon the party. MCA §2-4-621(1). Written requests for an oral argument must specifically set forth the party's exceptions to the proposed decision.

Oral arguments held pursuant to such a request normally will be scheduled for the locale where the contested case hearing in this matter was held. However, the party asking for oral argument may request a different location at the time the exception is filed.

Parties who attend oral argument are not entitled to introduce new evidence, give additional testimony, offer additional exhibits, or introduce new witnesses. Rather, the parties will



be limited to discussion of the evidence which already is present in the record. Oral argument will be restricted to those issues which the parties have set forth in their written request for oral argument.

Dated this 15<sup>th</sup> day of November, 1988.

Peggy A. Elting  
Peggy A. Elting, Hearing Examiner  
Department of Natural Resources  
and Conservation  
1520 E. 6th Avenue  
Helena, Montana 59620-2301  
(406) 444-6612

CERTIFICATE OF SERVICE

This to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties of record at their address or addresses this 15th day of November, 1988, as follows:

Christopher and Barbara Parkening  
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Sally Martinez  
Secretary

CASE # 49636